In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 551

VIRGIL T. BRINAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 39–47) have not yet been reported. The oral opinion of the district court overruling petitioner's motion to suppress evidence appears at pp. 13–15 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1947 (R. 47–48). A petition for rehearing (R. 51–59) was denied January 2, 1948 (R. 61). The petition for a writ of certiorari was filed January 27, 1948. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether there was probable cause for the search of petitioner's automobile.

STATEMENT

Petitioner was convicted on an information filed against him in the United States District Court for the Northern District of Oklahoma, charging the unlawful importation of intoxicating liquor into the State of Oklahoma from the State of Missouri in violation of Section 3 of the Liquor Enforcement Act of June 25, 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 223) (R. 1–2, 3). He was sentenced to imprisonment for 30 days and to pay a fine of $100 (R. 4). On appeal, the judgment was affirmed, one judge dissenting (R. 47–48).

Before trial, petitioner moved to suppress the use in evidence of the liquor on which the prosecution was based on the ground that it had been obtained as the result of an unlawful search and seizure (R. 2).

The facts adduced at a hearing on the motion may be summarized as follows:

On March 3, 1947, two investigators of the Alcohol Tax Unit were, about 6 p. m., stationed in a car near the Quapaw Bridge in north Oklahoma, about three or four miles west of the Missouri

line (R. 8; see R. 11, 13).[1] As petitioner passed the agents in his Ford coupe (R. 7), coming from the east, i. e., from the direction of Missouri, one of the agents recognized him as the man whom he had arrested about a month before for hauling liquor (R. 8). The agent had also seen petitioners loading liquor at Joplin, Missouri, at other times, and knew him to have a reputation for hauling liquor (R. 8).[2] Both agents testified that petitioner's car appeared to be loaded or weighted down (R. 8, 11).

As he passed the agents, petitioner "increased his speed at that moment," and the agents gave chase (R. 11, 8). Although the agents' car was "going as fast as it could" they "were not gaining * * * at all," until his car began skidding on a hill and he slowed down (R. 8–9). The agents then gained on petitioner, sounded the siren, and crowded petitioner's car to the side of the road where he stopped (R. 9, 11).

The agents got out of their car and as they approached petitioner, one of them asked "How much liquor have you got in the car this time," and petitioner replied, "Not too much" (R. 7, 9).

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[1] At the trial, one of the agents testified that the road on which they were stationed is a gravel road which runs directly east from Quapaw, Oklahoma, and that it has a number of curves, crosses the bridge, and then continues east into Missouri, connecting with the Missouri highway from Joplin to Seneca (R. 17).

[2] This agent testified at the trial that he recognized petitioner's car, which he "had seen before in Joplin," when the car passed the agents (R. 18).

After some questioning, petitioner said that there were 12 cases in the car (R. 11–12). One case was on the front seat. Petitioner testified that it was covered with a lap robe (R. 7), but one of the agents stated that it was open to view from outside the car (R. 9, 10). Twelve cases were found under and in back of the front seat (R. 7, 9).

The agents then placed petitioner under arrest (R. 9).

The district judge was of the opinion that the agents did not have sufficient probable cause to justify a search of the automobile before they stopped the car, since they were relying primarily on the fact that petitioner was known to be a bootlegger. He held, however, that petitioner's voluntary admissions, made after the car had been stopped, constituted probable cause for a search, and that the detention of petitioner by stopping his car, whether it be deemed an arrest or not, did not vitiate petitioner's voluntary statements as justifying the search. He accordingly ruled that the evidence was admissible. (R. 13–15.)

The circuit court of appeals (one judge dissenting) was of the same view. They thought that the facts within the knowledge of the agents prior to the time petitioner made the incriminating statements did not constitute probable cause for a search, but that, having stopped the car for the purpose of investigating, the agents

could then rely on petitioner's voluntary statements, which did furnish probable cause for the search (R. 41–44).

ARGUMENT

Whether the facts in the present case bring the rationale of the opinion below within the ruling in *Johnson* v. *United States*, No. 329, this Term, decided February 2, 1948, does not, in our view, present a case for certiorari. In any event, it is unnecessary to consider the correctness of the expressed rationale of the decision, because, *non constat* the holding below, it seems clear that the officers in the present case had reasonable cause to stop petitioner's car. The totality of the circumstances upon which we base this contention are:

The agents knew from previous observations and contact with petitioner that he was a liquor hauler. He passed the agents' car in the late afternoon on a gravel, tortuous, back road which led from wet Missouri into dry Oklahoma, only three or four miles from the Missouri line. The car appeared to the agents to be loaded or weighted down. When petitioner saw the agents he took flight (R. 11) and was overtaken only when he had to slow his car to avoid skidding on a hill. The element of flight was, we submit, too significant an element in appraising the reasonableness of the officers' action to be disregarded, as it was below.

As the Circuit Court of Appeals for the Second Circuit, speaking through L. Hand, J., stated in *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. C. A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727, a case which involved the similar question of flight as furnishing probable cause for the arrest of men who fled in an automobile at high speed after observing police officers, "it has long been recognized that flight, like the spoliation of papers, is a legitimate ground for the inference of guilt" [citing cases]. Certainly if a court and jury may consider flight as a factor in determining *guilt* of a defendant, *a fortiori* an officer of the law may rely on flight as strong evidence of probable cause. As the court stated in the *Heitner* case (149 U. S., at 106–107) "indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, * * *." "* * * it has at no time been doubted that flight is a circumstance from which a court or an officer may infer what everyone in daily life inevitably would infer." In the circumstances of this case, in which a known bootlegger fled in an apparently overloaded car along a back road leading into dry territory, it would seem clear that the officers had probable cause to believe that he was carrying liquor.

We do not have here involved the search of a person's home or apartment without a war-

rant. We have here, it seems to us, the situation in which this Court so recently in the *Johnson* case, *supra*, indicated, by way of contrast, that a warrant to search is not required to satisfy the Fourth Amendment. To quote from the slip opinion (pp. 4–5):

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. *No suspect was fleeing or likely to take flight.* The search was of permanent premises, *not of a movable vehicle.* No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant. [Italics supplied.]

CONCLUSION

The case involves nothing more than the application of settled principles to particular facts and, therefore, we do not think it is one which requires further exposition of the federal law of search and seizure.

Respectfully submitted.

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